
OPINION OF THE PUBLIC ACCESS COUNSELOR

REBECCA L. WHITE,
Complainant,

v.

WASHINGTON COUNTY ELECTION BOARD,
Respondent.

Formal Complaint No.
18-FC-137

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging that the Washington County Election Board violated the Access to Public Records Act¹ and the Open Door Law.² Attorney Dustin L. Howard filed an answer to the complaint on behalf of the board. In accordance with Indiana Code Section 5-14-5-10, I issue the following opinion to the

¹ Ind. Code §§ 5-14-3-1 to -10

² Ind. Code §§ 5-14-1.5-1 to -8.

formal complaint received by the Office of the Public Access Counselor on November 12, 2018.

BACKGROUND

This case involves a dispute between radio station WSLM and the Washington County Election Board over access to printed copies of election results and the board's decision to designate a "media room" for broadcasters on election night.

Rebecca L. White ("Complainant"), owner of WSLM, filed a formal complaint alleging the Washington County Election Board ("Board") violated the Access to Public Records Act ("APRA") and the Open Door Law ("ODL") by denying her access to print copies of election results in real time and by taking official action outside of a public meeting respectively.

On election night 2018 – November 6, 2018 – the Washington County Election Board performed its statutory duty at the Washington County Justice Center. Earlier in the evening, the County Clerk informed White that she would be required to set up in a separate "media room" to broadcast the WSLM's election coverage. This arrangement represented a change from that of previous elections. White was told this was a decision of the Election Board.

Coverage of prior elections included the media being handed precinct results in real time so that the broadcast media could inform listeners or viewers as the results came in. In 2018, however, those real-time results were denied concurrently with the closure of polls as they were read and displayed by the county attorney in a separate room (the Supe-

rior Court courtroom) where the county prohibited broadcasting. As a result, print media could transcribe—and presumably upload—results in real time, but the broadcast media was frozen out of events as they happened due to the new set up. Presumably radio and television reporters could have oscillated between the courtroom and the media room to deliver the results to on-air staff.

White’s petition to this Office is predicated on the denial of public access to the precinct results. The Open Door Law complaint focuses on the decision of the Election Board to determine the logistics at the physical location. White argues that these decisions must have been made outside of a public meeting.

The Election Board’s response argues that past practices of White potentially jeopardized the integrity of the election process based on a claim that she previously posted unverified results on social media while votes were still being counted.³ This presumably is the sole justification for not distributing copies of the precinct results as they became available on election night. Furthermore, the media room was established to prevent the on-air broadcasters from becoming a listening impediment to the rest of the attendees.

The Election Board argues these decisions were made at a public meeting through a resolution on June 28, 2018. The Clerk then made administrative decisions as to the logistics of the election night physical layout, i.e., the observation courtroom versus the media room. The Election Board also makes the argument that its November 6, 2018 activities –

³ Interestingly enough, the inaccuracies appear to be a consequence of the actions of the County’s vote machine vendor rather than White.

the sole purpose of its existence – did not qualify as *official action* on public business for purposes of the Open Door Law.

ANALYSIS

While the complaint and response invite commentary on a litany of facts and nuance, it can be distilled into two primary questions: (1) Were the activities of the Election Board on November 6, 2018 subject to the Open Door Law; and (2) Was it appropriate on election night for the Board to withhold real-time election results from broadcast media?

1. Open Door Law (“ODL”)

The public policy of the Open Door Law (“ODL”) is that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See* Ind. Code § 5-14-1.5-1.

Therefore—unless an exception applies—all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. *See* Ind. Code § 5-14-1.5-3(a).

Under the ODL, public notice must be given 48 hours in advance by the governing body of a public agency as follows: The governing body of a public agency shall give public notice by posting a copy of the notice at the principal office of the public agency holding the meeting or, if no such office exists, at the building where the meeting is to be held. Ind. Code § 5-14-1.5-5(b)(1).

The Washington County Election Board is a public agency for purposes of the ODL; and thus, subject to the law's requirements. That means, unless an exception applies, all meetings of the Board must be open at all times to allow members of the public to observe and record.

A gathering of a majority of a governing body convening to take official action on public business qualifies as a public meeting requiring openness and notice under the ODL. County election boards are no exception to this rule and two of three board members constitute a majority. This is expressly stated in Indiana Election Law as well.

Election night canvassing (tabulation) of votes must be performed in accordance with the Indiana Open Door Law except that the Election Board may reasonably restrict access to preserve the security of the process.⁴

Therefore the entirety of election night is a continuous public meeting beginning at 6 p.m. and continuing until all the votes are canvassed.

This Office declines to accept an argument that scales back the statutory definition of official action. The Board's entire existence centers on administering election activities. To argue that official action was not taken on election night is an incongruous application of the law.

The information provided does not suggest one way or the other whether notice was given of the Election Board's gathering that night, but that is not the focus of White's allegations. She alleges the decision to separate a media room from

⁴ Ind. Code § 3-12-4-6(b)

a canvassing observation room was made outside of a public meeting.

The Board argues it made the decision during a prior meeting where it voted to pass an election security measure resolution. Curiously enough, the Board resolution was not provided to the White upon request, which can be construed as a public records violation or an ODL violation if the Board took official action outside of a public meeting.

In any case, it does appear that the decision to separate broadcast media was done for practical reasons. Whether that was a decision of the Board or of the Clerk unilaterally is a question of fact. It matters not who made the decision, it is a reasonable one in that broadcasting the results aloud could interfere with others in the same room listening to the results.

The Open Door Law matter in this case is lesser of the two allegations, however, it does seem as if the Board has a casual and somewhat dismissive interpretation of the law. I encourage them to re-familiarize themselves with the purpose and scope of public meetings.

2. The Access to Public Records Act (“APRA”)

The Access to Public Records Act (“APRA”) states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” Ind. Code § 5-14-3-1.

The Washington County Election Board is a public agency for purposes of APRA; and therefore, is subject to the Act’s requirements. *See* Ind. Code § 5-14-3-2(q). Thus, unless an

exception applies, any person has the right to inspect and copy the Board's public records during regular business hours. Ind. Code § 5-14-3-3(a).

APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. In particular, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

The question in this case is what constitutes a reasonable time for providing election results as they become available. This Office almost never sets an expectation of immediate access of public documents. The APRA states that a public agency has a reasonable time to produce documents upon request.⁵ Critically, however, printouts of election results are one of those outliers.

There is no dispute that the copies of the results were available. The Election Board printed two copies of the precinct results and provided one to the Clerk's staff and one to the Election Board attorney to read to the audience in the court room.

The effort involved herein requires the printing of a third copy. That is a reasonable expectation.

Whether the Board likes it or not, the media is an essential partner in the dissemination of election results. It stands to

⁵ Ind. Code § 5-14-3-3(a)

reason that an election board would seek to ensure that results are available to the media that requests them on demand in order to satisfy the public interest. After all, there may be folks in the community that cannot—for one reason or another—spend their evening in a court room to find out which candidate prevailed in a particular race.

Trying to herd all interested parties into a room where an attorney manual dictates results off an overhead projector is a peculiar inefficiency. This is exasperated by having a broadcast staffer transcribe and then relay the results back to on-air staff in a separate media room.

This is equally true for print media that has to transcribe their own abstracts of results displayed on an overhead projector and post them online or social media in real time.

The Board gives casual mention to an inadvertent reporting inaccuracy – seemingly caused by a vendor – but does not explain how forcing broadcast media to play a game of telephone between two physical locations obviates any inefficiency or buttresses accuracy. It does not compromise voting security or impede or inconvenience the Board or the County in any way this Office can conceivably foresee.

If the media is a designated media watcher, it can get the results directly from the precincts as soon as the polls close in any event.⁶ Therefore the argument that the media is too sloppy with the facts to be trusted with the hard copies falls flat.

The solution to all of this is simple: give a printed copy of the results to broadcast media as they become available.

⁶ Ind. Code § 3-6-10 et.al.

This is done in almost every other county and would completely absolve this controversy going forward.

The Board does not provide a compelling reason to hoard hard copy results to itself until the very end of the process. Instead, it only appears as if the county is unnecessarily territorial about who gets to read the results.

CONCLUSION

Election night activities by a County Election Board are subject to the Indiana Open Door Law in accordance with Indiana Election Law. The Washington County Election Board should conduct itself accordingly in the future.

Moreover, providing hard copies of election results to the media as they become available is a common practice and an easy solution to inform the public and avoid similar disputes in the future. This Office can think of no reason why that should not be the practice in Washington County as well.



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